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INTRODUCTION

In 1971 the California legislature enacted Labor Code section 2805. That statute provides in pertinent part:

> No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.[1]

In 1974, section 2805 was declared unconstitutional in *Dolores Canning Co. v. Howard*[2] and *De Canas v. Bica*.[3] In each case the court

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1. CAL. LABOR CODE § 2805(a) (West Supp. 1971). The statute also provides fines from $200 to $500 for each violation as well as the right to bring a civil action against an employer.

2. 40 Cal. App. 3d 673, 115 Cal. Rptr. 435 (1974).

3. 40 Cal. App. 3d 976, 115 Cal. Rptr. 444 (1974), *cert. granted*, 421 U.S. 907 (1975).

concluded state action in regulating the employment of illegal aliens had been preempted by congressional enactment of the federal Immigration and Nationality Act of 1952.[4] This article is intended to explore the propriety of those rulings and suggest the feasibility of a uniform doctrine of preemption.

Pennsylvania v. Nelson OR *Head v. New Mexico Board of Examiners in Optometry* - A DOCTRINAL DILEMMA?

A state may not regulate in an area where its regulation would "[stand] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[5] Where a state regulation has such an effect, federal supremacy mandates the state action be preempted. Although the United States Supreme Court has never articulated a single and distinct formula for determining when the doctrine of preemption precludes state action,[6] at least two formulas have emerged and retained their vitality.

In *Pennsylvania v. Nelson*[7] the Court established a three-part test in which preemption is determined by whether

a) the scheme of federal regulation is so pervasive as to infer Congress left no room for state supplementation;
b) the federal statute touches a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state law on the same subject; and
c) enforcement of the state act presents a serious danger of conflict with the administration of the federal program.[8]

The *Nelson* test is subjective. It requires analysis of whether the federal government in each case possesses the dominant interest, and allows inferences to be drawn from the pervasiveness of whatever federal scheme exists in a given area of law.

In contrast, a more objective test for determining when preemption exists was formulated by the Court in *Florida Lime & Avocado*

4. 8 U.S.C. § 1101 *et seq.* (1965).
5. Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (footnote omitted).
6. *Id.*
7. 350 U.S. 497 (1956). In *Nelson*, the Court was asked to determine whether the Smith Act [18 U.S.C. § 2385 (1965)], which prohibited knowingly advocating the overthrowing of the government by force or violence, preempted the enforceability of a sedition act passed by Pennsylvania.
8. 350 U.S. at 501-02.

Growers, Inc. v. Paul[9] and *Head v. New Mexico Board of Examiners in Optometry.*[10] That formula provides that in areas of the law not inherently requiring national uniformity, a state statute otherwise valid, must be upheld unless

a) there is evidence of a congressional design to preempt the field; or

b) it is found such an actual conflict between the two schemes of regulation exists that both cannot stand in the same area.[11]

A cursory comparison of the *Nelson* and *Head* formulas could well lead one to conclude they are inconsistent or at least evidence of the Court's adaption to historical and political events.[12] Such a conclusion may be hasty. It is possible to articulate a uniform preemption theory which reconciles *Nelson* and *Head* and at the same time is flexible enough to permit consistent treatment of any controversy.

A Proposal

The threshold question in constructing a uniform preemption theory should be whether the relevant subject matter is one which is inherently federal, *i.e.*, it involves an area of law restricted to federal control because of constitutional mandates or absolute necessity.[13] Obvious examples of such subject areas are the nation's foreign policy and the raising of armies.

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9. 373 U.S. 132 (1963). There, a California statute prohibited the transportation for sale in California of avocados containing less than 8% oil by weight. California's right to set an oil percentage limit was challenged as having been preempted by the Federal Agriculture Marketing Act of 1937, which gave no significance to oil weights.

10. 374 U.S. 424 (1963). In *Head*, the New Mexico appellants owned a radio station and newspaper close to the Texas border. A New Mexico statute prohibited the advertising of Texas optometrists. Appellants asserted the New Mexico regulation had been preempted by the Communications Act of 1934.

11. *Id.* at 430.

12. For a thorough historical analysis of the Supreme Court's application of the preemption doctrine, *see* Note, *The Preemption Doctrine: Shifting Perspectives On Federalism And The Burger Court*, 75 Colum. L. Rev. 623 (1975).

13. Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424, 430 (1963); *see also* People v. Conklin, 12 Cal. 3d 259, 264, 522 P.2d 1049, 1051, 114 Cal. Rptr. 241, 243 (1974). In *Conklin*, the court was called upon to determine whether California Penal Code section 631(a), which prohibits wiretapping except by law enforcement officers unless all parties to the communication consent, was invalid because it had been preempted by congressional passage of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. The court concluded Congress had not intended to occupy the entire field involving interception of communications.

If it is determined that the applicable area is not inherently federal, inquiry may then be directed toward determining whether state regulation in the area is prohibited because of congressional action. At this point, *Nelson* and *Head* may be reconciled in the following manner. Where Congress has legislated in a specific area, the applicability of the *Nelson* or *Head* test depends upon whether sources of information which explain the congressional intent are available. If such sources do not exist, the *Nelson* test should be employed. If, however, such sources do exist, they must be examined pursuant to the *Head* criteria to determine if they manifest a clear and unmistakable desire to regulate the entire field.[14] There must be positive and unambiguous evidence of congressional intent to exclude state action.[15] Broad and general statements regarding a federal regulation's exclusivity or comprehensiveness are insufficient in themselves to demonstrate that state action has been precluded.[16]

If it is concluded that Congress has not intended to preempt state action in the area involved (either because no evidence of congres-

14. In *Nelson*, the Court stated its test should be applied when "Congress has not stated specifically" whether a federal statute has occupied a field of regulation. 350 U.S. at 501-02. The crucial question which arises is, when has Congress specifically stated whether it has occupied a field, thus making the *Nelson* test inapplicable? In order to adopt the formula advanced in this article, the question must be answered as follows: We can tell when Congress specifically states whether it has occupied an entire field only if there are sources of information derived from Congress with regard to the legislation in question. If such sources do not exist, *Nelson* must be applied. If such sources do exist, their content can be examined according to the *Head* test. Note that the initial inquiry is into the existence of documentation. Only secondarily is inquiry made into the content of documentation. In this regard it can be noted that no legislative reports or history exist for the Smith Act [18 U.S.C. § 2381 *et seq.* (1965), enacted June 25, 1948, ch. 645, 62 Stat. 808], which formed the basis of the controversy in *Nelson*.

The foregoing analysis appears to be the thrust of the theory advanced in *People v. Conklin*, 12 Cal. 3d 259, 522 P.2d 1049, 114 Cal. Rptr. 241 (1974), where the court noted the existence of congressional findings and reports with regard to the federal statute in question and refused to apply the *Nelson* test. *See id.* at 266 n.5, 522 P.2d at 1053 n.5, 114 Cal. Rptr. at 245 n.5.

15. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142, 146-47 (1963); Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424, 431-32 (1963).

16. New York Dept. of Social Servs. v. Dublino, 413 U.S. 405, 415 (1973); Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424, 430-31 (1963); California v. Zook, 336 U.S. 725, 731 (1949).

sional intent exists and the *Nelson* test has not been met, or because evidence exists and it does not *clearly* preclude state action) it remains to be determined whether there is such a conflict between the state and federal schemes that both cannot stand. This is an inquiry "conceptually distinct" from the question of preemption.[17] It involves the crucial consideration of whether the state regulation stands as an obstacle to congressional goals and objectives.[18]

> The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.[19]

Opinions of the Supreme Court which have followed *Head* would appear to support the foregoing analysis. In *Goldstein v. California*,[20] the Court was called upon to decide whether a California statute proscribing record and tape piracy had been effectively preempted by the copyright clause of the Constitution.[21] The Court examined the purpose of the copyright clause as explained by James Madison.[22] The Court also examined the history of state regulation of patents.[23] In none of the "evidence" examined did the Court find an express federal desire to preclude state action.[24] At the same time, the Court determined the general area of copyright law is not exclusively federal in nature:

> [I]t is unlikely that all citizens in all parts of the country place the same importance on works relating to all subjects. Since the subject matter to which the Copyright Clause is addressed may thus be of purely local importance and not worthy of national attention or protection, we cannot discern such an unyielding national interest as to require an inference that state power to grant copyrights has been relinquished to *exclusive* federal control.[25]

Following this analysis, the *Goldstein* court determined the challenged statute did not conflict with, and hence did not stand as an obstacle to, the accomplishment of the full objectives of Congress.[26]

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17. People v. Conklin, 12 Cal. 3d 259, 264-66 n.4, 522 P.2d 1049, 1052 n.4, 114 Cal. Rptr. 241, 244 n.4 (1974).
18. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).
19. Florida Lime & Avocado Owners, Inc. v. Paul, 373 U.S. at 142; *accord*, People v. Conklin, 12 Cal. 3d 259, 270, 522 P.2d 1049, 1055-56, 114 Cal. Rptr. 241, 247-48 (1974).
20. 412 U.S. 546 (1973).
21. U.S. CONST. art. I, § 8, cl. 8.
22. The Federalist No. 43 at 309, *cited in* Goldstein v. California, 412 U.S. at 555-56.
23. *Id.* at 556-57.
24. *Id.*
25. *Id.* at 557-58 (Court's emphasis).
26. *Id.* at 561-70.

In *New York Department of Social Services v. Dublino*,[27] New York's Social Welfare Law was challenged as having been preempted by the federal Work Incentive Program. The Court noted it had examined congressional committee reports as well as the history of the Work Incentive Program and found no express desire to preclude state action in the area under consideration.[28] The Court did not make a finding with regard to the conflict between the state and federal laws. Because the lower court had not made a finding in this regard, the case was remanded.[29]

Kewanee Oil Co. v. Bicron Corp.[30] also involved the copyright clause and a state's power to enact legislation concerning trade secrets. The Court relied upon *Goldstein* and pointed out that the existing evidence of the intent of the copyright clause did not demonstrate congressional desire to exclude the state's participation in the area.[31] Citing the *Head* preemption formula, the Court went on to consider whether the state law conflicted with federal law.[32]

The uniform preemption theory which has been advanced appears to be viable. However, for the purposes of this analysis it remains to be determined whether application of this theory precludes the regulation of illegal aliens contained in California Labor Code section 2805.

THE PROPOSAL AND STATE REGULATION OF THE ILLEGAL ALIEN

Under the theory which has been advanced, there is a strong argument Labor Code section 2805 is unconstitutional. This argument is not synonymous, however, with concluding that state regulation of illegal aliens has been preempted.

Defining the Controversy

The first step in the analysis is determining whether the subject matter of the controversy is inherently federal in nature. This step is the most crucial, for the conclusion here will necessarily depend upon how broadly the subject matter is defined. If the problem

27. 413 U.S. 405 (1973).
28. *Id.* at 414, 416-17.
29. *Id.* at 422.
30. 416 U.S. 470 (1974).
31. *Id.* at 478-79.
32. *Id.* at 479-80.

of the illegal alien is defined as one of "immigration and naturalization of aliens," it can be readily concluded that the subject matter is inherently federal and the analysis need go no further—state action must be precluded. By necessity, the Government's role in regulating aliens, immigration and naturalization precludes state action largely because of the delicate international and political implications involved in regulating these areas.[33] On the other hand, the more narrowly the problem is defined, the clearer it is that the subject matter might not be inherently federal. If, for example, the problem is defined as "the employment of illegal aliens," state action may not be precluded. The Immigration and Nationality Act of 1952 arguably seeks to regulate the initial, *lawful* entry of aliens into this country—not the illegal entry of aliens. Moreover, employment regulations in general have been traditionally construed as within the legitimate police power of the states.[34] And, state employment regulations dealing specifically with aliens may be upheld if narrowly confined and precise or if related to defining a state's political community.[35]

The question which arises is, of course, how narrowly should the present problem be defined. Certainly the nature of the problem of the illegal alien would appear to be more narrow than "immigration and naturalization." It involves distinctly local concerns. For example, due to geography, illegal alien problems would appear to be more severe in Southern California than in Kansas City. The most direct impact of the illegal alien is on local employment.[36] These factors should preclude a conclusion that the nature of our controversy is inherently federal in nature.

Application of the Head *Criteria: The Nonexistence of Preemption*

An examination of the House Reports and the history surround-

33. Interestingly, the courts in both *Dolores Canning Co. v. Howard*, 40 Cal. App. 3d 673, 115 Cal. Rptr. 435 (1974) and *De Canas v. Bica*, 40 Cal. App. 3d 976, 115 Cal. Rptr. 444 (1974) appear to have employed a broad definition of the illegal alien controversy.

34. *See* Nebbia v. New York, 291 U.S. 502 (1934); Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, 209-10 (1934). It has also been held that although the Secretary of Labor may determine which and how many immigrants are to be allowed into the United States in order to preserve the labor markets, this ability applies only to an initial, lawful entry of the alien. Once immigrants are given permission to enter, the Secretary of Labor and United States Attorney General may not seek to regulate them in order to affect local labor disputes in a state. Sam Andrews' Sons v. Mitchell, 457 F.2d 745, 748 (9th Cir. 1972).

35. Sugarman v. Dougall, 413 U.S. 634, 646-49 (1973).

36. *See* Diaz v. Kay-Dix Ranch, 9 Cal. App. 3d 588, 88 Cal. Rptr. 443 (1970).

ing the Immigration and Nationality Act of 1952[37] does not reveal a positive and unequivocal intent to prevent state action. Although there is general language in the history of the Act which discusses the desire to enact comprehensive federal legislation in the area of immigration,[38] this in itself is not sufficient to demonstrate the positive evidence required to preclude state action.[39] In fact, it can be inferred that Congress actually contemplates state participation in some areas of immigration regulation. In 1965 the Immigration and Nationality Act was amended to provide a new set of controls to protect the American labor market from an influx of skilled and semiskilled foreign labor. In promulgating these amendments it was stated:

> The Department of Labor should have no difficulty in adapting to this new [certification] procedure inasmuch as the Department, through its Bureau of Employment Security and affiliated State Employment Service agencies, presently determines availability of domestic workers and the standards of working conditions.[40]

The Failure of Labor Code Section 2805: A Finding of Conflict

From the foregoing it seems clear there is a strong argument that regulating employment of illegal aliens is not an inherently federal question. Nor has state regulation of illegal aliens been preempted by the Immigration and Nationality Act. However, California's Labor Code section 2805 presents a serious conflict with federal regulation. Section 2805 permits employment only of those aliens entitled to *residence* in the United States. By its terms the statute excludes from employment the temporary daytime workers federal authorities might lawfully bring into the country for special jobs.[41] Interestingly, it was partially on this ground that the

37. 8 U.S.C. § 1101 *et seq.* (1965).

38. H.R. REP. No. 1365, 82d Cong., 2d Sess. (1952), accompanying H.R. REP. No. 5678 in 2 U.S. CODE CONG. & AD. NEWS 1653, 1677-78 (1952).

39. Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424, 430-32 (1963).

40. S. REP. No. 748, 89th Cong., 1st Sess. (1965) in 2 U.S. CODE CONG. & AD. NEWS 3334 (1965).

41. *See* Purdy & Fitzpatrick v. California, 71 Cal. 2d 566, 575, 456 P.2d 645, 651, 79 Cal. Rptr. 77, 83 (1969). In *Purdy*, California Labor Code section 1850, which prohibited employment of aliens as public workers, was found to conflict with provisions of the Immigration and Nationality Act which permits the federal government to allow temporary daytime workers into the country.

court in *Dolores Canning Co.* declared section 2805 unconstitutional.[42] As was noted there, it is entirely possible that section 2805 stands as an obstacle to the execution of federal objectives.

Conclusion

If the subject of the controversy is narrowly defined, the problem of the illegal alien may be at least a partially local concern. If this conclusion is reached, the question of preemption arises, and since evidence of congressional intent in promulgating the Immigration and Nationality Act of 1952 exists, it must be determined if that evidence unequivocally precludes state action. It can be argued that it does not. Hence, the question of section 2805's conflict with federal goals arises. It is here that the statute faces its most strenuous constitutional test.

On June 22, 1975, the United States Supreme Court granted certiorari in *Bica.* It is not readily apparent what disposition the Supreme Court will take with that case. Even if the Court declares section 2805 unconstitutional, the decision may not necessarily be interpreted to mean that all state regulations concerning illegal aliens have been preempted by the federal government. Whatever the outcome, the Court's opinion is being anxiously awaited by both legislative draftsmen and those employers whose work force depends upon illegal immigrants.

42. Dolores Canning Co. v. Howard, 40 Cal. App. 3d 673, 115 Cal. Rptr. 435 (1974).